IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5521

SYLVIA SCOTT WHITLOW,

Petitioner,

v.—

F. E. HODGES, Director, Division of Driver Licensing, Department of Public Safety of the Commonwealth of Kentucky,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 23, 1976.

OPINIONS BELOW

The July 23, 1976 opinion of the Court of Appeals for the Sixth Circuit is not yet reported; it is set out in the Appendix, infra, at 1-A. The January 17, 1975 opinion of the Court of Appeals rendered when the case was first before it is not reported; it is set out in the Appendix, infra, at 17-A. Neither of the two opinions rendered by District Court for the Eastern District of Kentucky was reported; both are set out in the Appendix, infra, at 9-A and 22-A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

" . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether a state may constitutionally require that a married woman who has not adopted her husband's surname as her own for any social or legal purpose, receive a driver's license in his surname, unless and until she has obtained a court order "changing" her name to the name she in fact uses.

STATEMENT OF THE CASE

The petitioner, plaintiff below, is an instructor at the University of Kentucky's School of Journalism. Throughout her life she has been known by the name Sylvia Scott Whitlow. She continued to use that name for all purposes following her marriage to Norman Van Tubergen in Lexington, Kentucky on December 20, 1973.

An unwritten regulation, promulgated by the Kentucky Division of Driver Licensing, of which the respondent is the present Director, requires that a married woman apply for and receive a driver's license in the surname of her husband whether or not she has adopted his surname as her own. Pursuant to this regulation, the petitioner was informed by the appropriate state officials that she could not apply for a driver's license in the name Sylvia Scott Whitlow. Because Sylvia Scott Whitlow was unwilling to apply for a driver's license in a name other than her own, she has been unable to obtain a Kentucky driver's license.

On April 15, 1974, petitioner instituted a class action in the United States District Court for the Eastern District of Kentucky, challenging on due process and equal protection grounds the unwritten regulation in question. On May 6, 1974, the District Court entered a one-line order dismissing the complaint on the authority of Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd mem., 405 U.S. 970 (1972).

Petitioner took a timely appeal to the United States Court of Appeals for the Sixth Circuit, which, on January 17, 1975, entered an order vacating the judgment of the District Court and remanding the case for a determination, inter alia, whether "Kentucky law allows a married woman to retain her maiden name as her legal name." Appendix, infra, at 19-A. On February 14, 1975, the District Court again dismissed the complaint, this time issuing a memorandum 1) declaring Kentucky law required a married woman to change her surname to that of her husband, and 2) reasserting reliance on Forbush.

Petitioner again appealed, and on July 23, 1976, the Sixth Circuit affirmed the dismissal order, this time holding that Forbush controlled even if the District Court misread Kentucky law. The majority below reasoned that whether or not Kentucky law required a married woman to change her surname to that of her husband for any or all purposes, Forbush impelled rejection of Sylvia Scott Whitlow's claim. The Forbush summary affirmance, and the "convenience" rationale of the Forbush three-judge federal district court, sufficed to uphold the Division of Driver Licensing's unwritten requirement that a

married woman apply for and receive a driver's license in the surname of her husband unless and until she has obtained a court-ordered name change, "restoring" her own name.[1] Judge McCree dissented on the ground that "[the court] cannot determine whether this case is governed by Forbush . . . unless [it] first determine[s] whether . . . Kentucky . . . requires a married woman to adopt her husband's surname." Appendix, infra, at 5-A.

REASONS FOR GRANTING THE WRIT

I.

The decision below, upholding an unwritten state regulation requiring a married woman who has not adopted her husband's surname as her own, to obtain her driver's license in her husband's surname, rendered under the compulsion of this Court's summary disposition in *Forbush v. Wallace*, 405 U.S. 970 (1972), conflicts with the Court's subsequent plenary decisions from *Frontiero v. Richardson*, 411 U.S. 677 (1973), through *Stanton v. Stanton*, 421 U.S. 7 (1975).

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[1] The court noted that Ky. Rev. Stat. 401.010 "affords a simple and inexpensive means of changing one's name."

The Sixth Circuit concluded that Forbush was "on all fours with the instant case." Under the compulsion of Forbush, Hicks v. Miranda, 422 U.S. 332 (1975), it sustained the constitutionality of the state regulation in question.

In Forbush, this Court, without hearing argument and without opinion, summarily affirmed the decision of a three-judge federal district court holding constitutional Alabama's requirement that a married woman use her husband's surname for such official purposes as obtaining a driver's license, unless and until she successfully petitions for a court-ordered name change. In the instant case, petitioner argued below that the three-judge district court holding and rationale in Forbush could not survive measurement against subsequent plenary decisions of this Court assessing the constitutionality of sex-based discrimination. E.g., Frontiero v. Richardson, supra; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, supra. Petitioner's argument was rejected by the Sixth Circuit on the ground that reappraisal of Forbush in light of this Court's recent, fully-reasoned decisions was not a course open to a lower court. For the nation's tribunals are bound by Supreme Court summary dispositions "until such time as th[is] Court informs [them] that [they] are not." Hicks v. Miranda, supra, 422 U.S. at 344-45.

It is petitioner's position that: 1) Forbush stands in glaring conflict with the Court's current, vibrant precedent; 2) absent certiorari to determine the continuing

vitality of Forbush, lower courts will remain under constraint to follow outgrown dogma and avoid reasoned decision.

Precedent developed subsequent to Forbush displays sensitivity to the reality that "[o]ld accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." Green v. Waterford Board of Education, 473 F.2d 629, 634 (2d Cir. 1973). The regulation here at issue is a clear example of such a rule or custom.

This Court's very recent course of decision casts a heavy cloud of unconstitutionality over a state's insistence that a wife take her husband's surname as her own for any purpose. While it may be "more irrational" for a state to require the wife to use her husband's surname for some purposes (e.g., obtaining a driver's license) but not others (e.g., voting) than it is to require her to use his surname for all purposes, no official compulsion to use a husband's surname relates fairly and substantially to the advancement of a legitimate state interest, as that concept has been defined by this Court in Frontiero and thereafter. Furthermore, no legitimate state interest conceivably can be served by requiring a person (male or female) to use a name for any purpose which is not the

name by which that person is otherwise known.[2]

In the view of the Sixth Circuit's majority, however, it made no difference whether or not Kentucky law required that a married woman take her husband's surname as her own for any purpose. The essential premise of Forbush, the majority below reasoned, was that "administrative convenience" justified a state agency's insistence that a married woman obtain a driver's license in her husband's surname. Frontiero makes it abundantly clear that the shibboleth "administrative convenience" can no longer be relied upon to salvage

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[2] The "uniformity" rationale of Forbush, premised on the existence of a so-called "common law rule" requiring a woman to change her name to that of her husband, has been obliterated by the dozens of state court decisions and attorney-general opinions rendered since March 1972 upholding the right of married women to the surnames of their choice. See, e.g., In re Reben, 342 A.2d 688 (Me. 1975); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223 (1972); Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975); In re Strikwerda, 216 Va. 470 220 S.E.2d 245 (1975); Kruzel v. Podell, 67 Wis.2d 138, 226 N.W.2d 458 (1975); Custer v. Bonadies, 30 Conn.Sup. 387, 318 A.2d 639 (1974); Davis v. Roos, 326 So.2d 226 (Fla.App. 1975); In re Mohlman, 26 N.C.App. 220, 216 S.E.2d 147 (1975); Application of Lawrence, 133 N.J.Super. 408, 337 A.2d 49 (1975); Cal. Op. Att'y Gen., March 12, 1974; Ill. Op. Att'y Gen., No. S-711, Feb. 25, 1974; Pa. Op. Att'y Gen., No. 72, Oct. 25, 1973.

rank sex-based discrimination. In any event, it is impossible to discern how the objective "administrative convenience" is advanced by a requirement that a person obtain a driver's license in a name she does not use for any other purpose.

Nor can the sex discriminatory practice at bar be sustained on the basis of "old notions" relating to the supremacy of the husband and the dependent role of the wife in the marriage relationship. Stanton v. Stanton, supra; Weinberger v. Wiesenfeld, supra. The arbitrariness of the discrimination is not mitigated by the "opportunity" the woman has to achieve "restoration" of her own name by a court-ordered name change, for there is no legitimate state interest in requiring her to take her husband's surname as her own in the first place. Indeed, the fact that by pro forma court order she can be "restored" to the name she uses underscores the irrationality of requiring her to take her husband's surname at all. By providing for judicial "restoration" of the married woman's own name, the state declares that it has no policy requiring married persons to have the same surname.[3]

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[3] It should be noted that statutes referring to "changes of name at marriage" do not reflect a requirement that married couples must bear a common surname. See, e.g., Kruzel v. Podell, supra, 67 Wis.2d at 154, 226 N.W. 2d at 466.

In sum, the impact of Forbush, as reflected in the Sixth Circuit majority's decision in the case at bar, is that even if state law otherwise does not require a married woman to change her surname to that of her husband, a state agency may constitutionally impose such a requirement on a married woman for a particular purpose, e.g., the issuance of a driver's license, although the woman is known by her own name for all other purposes. "If this be rational, nothing is irrational!" Struck v. Secretary of Defense, 460 F.2d 1372, 1379(1972) (Duniway, J. dissenting opinion). Certiorari should be granted so that this Court can determine authoritatively the validity of any state-imposed requirement that a married woman change her surname to that of her husband for any purpose.

II.

Certiorari should be granted to determine whether the summary disposition in *Forbush v. Wallace*, 405 U.S. 970 (1972), which has never been cited as precedent by this Court, but by which the lower federal courts are bound "until such time as this Court informs [them] that [they] are not," retains vitality in light of subsequent plenary decisions invalidating arbitrary official line drawing by gender.

Certiorari should be granted in the case at bar to instruct the nation's lower courts whether the Forbush summary affirmance, rendered without hearing argument and without opinion, reflects this Court's current view of the controlling constitutional principle. As pointed out previously, the "administrative convenience" rationale proffered by the three-judge federal district court in Forbush is plainly inconsistent with this Court's judgment in Frontiero. Moreover, the Court's path-marking decisions from Frontiero through Stanton signal that the discrimination involved in Forbush and the case at bar can no longer be written off as an issue unworthy of careful constitutional scrutiny.

Given this Court's stern admonition in Hicks v. Miranda, 422 U.S. 332, 344-345 (1975), concerning the binding effect of summary dispositions, the Sixth Circuit's solid and sole reliance on Forbush is understandable. While summary affirmances are unquestionably dispositions on the merits, Hicks v. Miranda, supra, they are of limited precedential value in this Court. Edelman v. Jordan, 415 U.S. 651, 671 (1974). With the recent repeal of the three-judge court act, 28 U.S.C. §§2281-2284, and its concomitant authorization of direct appeal to this Court under 28 U.S.C. §1253, the incidence of summary affirmance is likely to decrease markedly. This significant change in the burden of direct appeals should impel close review of prior summary dispositions in three-judge district court cases, particularly in an area such as the constitutional validity of sex-based

classification, where the law has evolved rapidly within the space of a few years.

The pattern of this Court's gender-based discrimination decisions makes it abundantly clear that irrational and arbitrary sex-based classification cannot be squared with the commands of the Constitution. But the summary disposition in Forbush blocks application of the Court's recent and reasoned precedent to the right of a married woman to choose her own name. Instead, Forbush reinforces "old notions" about male supremacy and the dominance of the husband in this area, an area of vital concern to women.[4] The sweeping impact of Forbush on the right of a married woman to decide the name by which she will be known, as starkly demonstrated by the Sixth Circuit's decision in the case at bar, furnishes a compelling reason for the grant of certiorari and the authoritative determination by this Court of the present vitality of that summary decision.

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[4] See generally Center for a Woman's Own Name, For Women Who Wish to Determine Their Own Names After Marriage (1974).

Conclusion

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

No. 75-1519

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SYLVIA SCOTT WHITLOW, *Plaintiff-Appellant,* v. F. E. HODGES, Director, Division of Driver Licensing, Department of Public Safety of the Commonwealth of Kentucky, *Defendant-Appellee.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed July 23, 1976.

Before: McCREE, LIVELY and ENGEL, Circuit Judges.

ENGEL, J., delivered the opinion of the Court, in which LIVELY, J., joined. McCREE, J., (pp. 5-8) filed a dissenting opinion.

ENGEL, Circuit Judge. At issue in this appeal is whether the Commonwealth of Kentucky may constitutionally require a married woman to make application for and receive a motor vehicle operator's license in the surname of her husband despite a showing that for all other purposes the woman has continued to use her maiden name. Plaintiff's complaint alleges that defendant's policy violates her civil rights under the due process and equal protection clauses of the Fourteenth Amendment. She seeks relief under 42 U.S.C. § 1983, premising federal jurisdiction upon 28 U.S.C. § 1343.

By brief order, the late District Judge Mac Swinford dismissed the complaint relying wholly upon *Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D.Ala. 1971), a three-judge district court ruling, *affirmed* without opinion by the Supreme Court at 405 U.S. 970 (1972). The court in *Forbush* denied the same claim now being urged by plaintiff in the instant case.

Upon appeal, this court entered an order remanding the cause to the district court primarily to permit an inquiry into whether Kentucky law allows a married woman to retain her maiden name as her legal name, indicating that if the district court should find that Kentucky law, like that of Alabama, requires a woman to take her husband's surname upon marriage, then a three-judge court would not be required under 28 U.S.C. § 2281, as the result would be clearly compelled by the affirmance of *Forbush*. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). Upon remand, Chief District Judge Bernard T. Moynahan, Jr. reached the conclusion that under the common law of Kentucky, a woman upon marriage abandons her maiden name and assmues her husband's surname. The district judge accordingly determined that the two cases were identical and once more entered an order of dismissal of the complaint. In this posture the case was again appealed to this court.

In this appeal, most of the briefing of the parties and the attention of the court was directed to whether the district judge was correct in his interpretation of the Kentucky common law. Upon further reflection we have concluded that notwithstanding our original concern in remanding, we need not determine with finality that the challenged regulation is consistent with the common law of Kentucky, a question which we believe upon the existing state of the law in Kentucky is better left to more definite resolution by the courts of Kentucky. Instead, while *Forbush* is no doubt reinforced by such a finding under the common law of Alabama, we read its

primary thrust as directed to the question of whether the challenged regulation has a rational connection with a legitimate state interest. *Forbush, supra*, at 222. Thus the concern in *Forbush*, and ours here, is whether the conduct complained of abridges plaintiff's rights under the Constitution of the United States. If the challenged conduct is under color of state law, " . . . inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278, 287 (1913); *Accord, Monroe* v. *Pape*, 365 U.S. 167 (1961); *Daniel* v. *Waters*, 515 F. 2d 485, 488 (6th Cir. 1975).

So viewed, we find *Forbush* on all fours with the instant case. Here precisely as in *Forbush*, an unwritten regulation is challenged. The rationale of *Forbush* can be applied equally here and without variation. Kentucky law, like that of Alabama, affords a simple and inexpensive means of changing one's name. *Winkenhofer* v. *Griffin*, 511 S.W. 2d 216 (Ky. 1974); Kentucky Revised Statutes, KRS § 401.010, as amended (1974).*

Plaintiff argues that this court should feel free to depart from the Supreme Court's summary affirmance of *Forbush*, and quotes Justice Rehnquist's comments in *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974) that "[summary affirmances] are not of the same precedential value as would be an opinion of this Court treating the question on the merits". We might be inclined to agree with plaintiff, see *Jordan* v. *Gilligan*, 500 F. 2d 701, 707 (6th Cir. 1974), *cert. denied* 421 U.S. 991 (1975), were it not for the recent pronouncements on the precedential value of Supreme Court summary actions in *Hicks* v. *Miranda*, 422 U.S. 332 (1975). The Court in *Hicks* rejected a three-judge district court's conclusion that it was not

* Significantly KRS § 401.010 was amended in 1974 by deleting an exception to the name change statute in the case of married women.

bound by a Supreme Court dismissal of a judgment of a California court "for want of a substantial federal question". The California court had sustained the constitutionality of the same obscenity statute which the three-judge court later decided was unconstitutional. The Supreme Court stated that the district court should have followed the Second Circuit's advice in *Doe* v. *Hodgson*, 478 F. 2d 537, 539 (2nd Cir.), *cert. denied*, 414 U.S. 1096 (1973), that the "lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not'." *Hicks* v. *Miranda*, 422 U.S. at 344-345.

Accordingly, this court deems itself bound by the Supreme Court affirmance in *Forbush* v. *Wallace, supra.*

Affirmed.

McCree, Circuit Judge (Dissenting). I respectfully dissent. We cannot determine whether this case is governed by *Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd* 405 U.S. 970 (1972), unless we first determine whether the common law of Kentucky, like that of Alabama, requires a married woman to adopt her husband's surname.

This requirement of the Alabama common law is the cornerstone of the *Forbush* opinion. The court stated:

> We may commence our analysis of the merits of the controversy by noting that Alabama has adopted the common law rule that upon marriage the wife by operation of law takes the husband's surname. Roberts v. Grayson, 233 Ala. 658, 660, 173 So. 38 (1937); Bentley v. State, 37 Ala.App. 463, 465, 70 So.2d 430 (1954). Apparently, in an effort to police its administration of the issuance of licenses and to preserve the integrity of the license as a means of identification, the Department of Public Safety has required that each driver obtain his license in his "legal name." Thus, in conformity with the common law rule, the regulation under attack requires that a married woman obtain her license in her husband's surname.
> 341 F.Supp. 221.

Proceeding from this premise, the court held that the regulation was "reasonable" and not violative of equal protection. The court also determined that the underlying state common law rule that a wife must adopt her husband's surname did not violate equal protection, since it was based upon "a tradition extending back into the heritage of most western civilizations," and upon a custom common to all 50 states. Further, the court indicated that this was an area where uniformity among the states is important. Finally, the court added to its analysis of both the regulation and the common law rule the observation that because the state provided a simple and inexpensive procedure for name changes, any injury suffered by plaintiff's class was *de minimus* compared with

the administrative difficulties that the state would experience should the regulation be invalidated.

As this analysis of *Forbush* demonstrates, its result is bottomed on the settled state of the common law of Alabama. Accordingly, our case can be governed by *Forbush* if and only if Kentucky, like Alabama, clearly requires a married woman to adopt her husband's surname.

The cases are alike in respect that Kentucky, like Alabama, requires a driver to obtain a license in his legal name. However, the majority opinion does not determine whether the district court was correct in holding that Kentucky, like Alabama, also had a common law rule requiring a married woman to adopt her husband's surname. Instead, it expressly leaves this question open, stating that it "is better left to more definite resolution by the courts of Kentucky." Accordingly, it acknowledges the possibility that Kentucky law does *not* require a married woman to adopt her husband's surname, and that, as plaintiff alleged in her complaint, there is a class of married women too numerous to be joined in this action who, as was their right under state law, did not adopt their husband's surnames and have always been known only by their former names. Mistakenly following *Forbush*, the majority opinion would hold that Kentucky, which requires a driver to be licensed in his legal name, can rationally require persons in plaintiff's class to be issued licenses in names which under state law are *not* their legal names and by which they have never been known. Accordingly, the state interests found to be determinative in *Forbush*, the effective administration of the issuance of licenses and the preservation of the integrity of licenses as a means of identification, cannot possibly be served by requiring a class of drivers to be issued licenses in names which are not their legal names, and by which they are not and have never been known. It seems equally clear that *Forbush*, which depends upon a rational justification, does not compel such a result.

It is therefore essential in this case, as in *Forbush*, to begin analysis by determining whether Kentucky has a common law (or statutory) rule that requires a woman to adopt her husband's surname when she marries. I do not disagree with the general proposition stated in the majority opinion that conduct under color of state law can violate constitutional rights even if it is not authorized by the state. This statement is applicable where the conduct of a person acting under color of state law violates a specific constitutional prohibition, such as the Fourth Amendment prohibition against unreasonable searches and seizures. The equal protection clause, however, does not prohibit a specific practice, but instead prohibits any action that denies the equal protection of the law. By interpretation, the equal protection clause requires that there be a rational connection between a challenged state rule or classification, on the one hand, and a legitimate state interest that it serves, on the other. It is thus essential to determine what classification or rule the state applies and what state interest is to be benefited in order to determine the rationality of the relationship between the two.

Accordingly, I cannot agree with the majority opinion that we can assess the rationality of the state licensing regulation without first determining whether it is (1) a rule that requires married women to hold drivers licenses in their legal names — even if they disagree with the state rule that makes their husbands' surnames their legal names (*Forbush*), or (2) (as plaintiff asserts) a rule that requires persons in plaintiff's class to be issued licenses in names that under state law are *not* their legal names and by which they have never been known.

The majority opinion suggests that we should decline to decide the state law question, and the parties disagree whether the Kentucky rule is the same as that of Alabama. If a majority of the court believe that this is a proper case for abstention, then I think that we should so state forthrightly,

and remit plaintiff to the state courts. If not, I think we must first determine what is the law of Kentucky, and then assess its compliance with the constitutional requirements of the equal protection clause.

MEMORANDUM OPINION OF THE DISTRICT COURT
Filed February 14, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL NO. 74-7

PLAINTIFF

SYLVIA SCOTT WHITLOW

v.

F.E. HODGES, DIRECTOR
DIVISION OF DRIVER LICENSING

DEFENDANT

MEMORANDUM

This civil rights action attacks directives of the Kentucky Division of Driver Licensing requiring married women to make application for motor vehicle operator's licenses in the husband's surname. The complaint alleges that the regulations are arbitrary and unreasonable and constitute an impermissible sex-

based discrimination. On May 6, 1974, the action was dismissed in an order citing Forbush v. Wallace, M.D. Ala., 341 F. Supp. 217 (1971) aff'd 405 U.S. 970 (1972). An appeal was taken and on January 17, 1975, the Sixth Circuit Court of Appeals vacated and remanded for resolution of the following issues:

> "(W)hether Kentucky law allows a married woman to retain her maiden name as her legal name, whether a woman applying for a motor vehicle license must do so in her legal name, and whether the instruction of the Director complies with these laws .... If the district court should determine that Kentucky law, like Alabama law, requires a woman to take her husband's surname upon marriage, then a three-judge court is not required. Bailey v. Patterson, 369 U.S. 31 (1962)."

The plaintiff admits the non-existence of a Kentucky statute or ruling adjudicating the primary issue presented by the Court of Appeals but argues that the common law as adopted by the Commonwealth does not require a married woman to assume her husband's surname. The court agrees that the absence of statutory or judicial authority on this issue results in the application of general common law:

> "Kentucky is a common law State. Our common law originated as an English institution evolved from local rules and customs which were in time recognized by the King's Court. That great mass of law has been accepted as part of the general law of almost every State of the Union.
>
> * * * * * * *
>
> It has long been accepted ... that the common law prevails unless changed by our constitution or statutes." Pryor v.

Thomas, Ky., 361 S.W.2d 279, 280 (1962), cert. denied 372 U.S. 922 (1963). Kentucky Constitution, Section 233; Miller v. Scott, Ky., 339 S.W.2d 941 (1960); Commonwealth v. Donoghue, 250 Ky. 343 (1933). However, the contention that a married woman is not required to assume the surname of her husband is supported by no applicable authority and would appear to conflict with the common law rules merging the wife's legal identity with that of her husband:

> "The common law devised a scheme that made for unity in the marriage relations of husband and wife. To secure this unity, the law proceeded upon the theory or assumption that the wife's legal existence was, in virtue of the marriage, suspended or extinguished during the marriage state. The very legal being and existence of the woman was suspended during coverture, or entirely merged or incorporated

> in that of the husband .... The husband lost nothing by the marriage, but the wife surrendered her property to him, and lost her independence and identity in law." Palmer v. Turner, 241 Ky. 322, 324 (1931).

Although not addressing the issue presented in the case at bar, the Palmer decision is in clear accord with the "common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname." 57 AM.Jur.2d "Name", Section 9; Accord, People v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642, 644 (1945).

The conclusion that the applicable law requires a married woman to assume her husband's surname renders this action susceptible to the Forbush v. Wallace

holding, negates the necessity of addressing the other issues raised, and seemingly complies with the January 17, 1975 , order of the Court of Appeals.

February 14, 1975

United States District Judge

ORDER OF THE DISTRICT COURT
DISMISSING COMPLAINT
Filed February 14, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

FRANKFORT

SYLVIA SCOTT WHITLOW PLAINTIFF

VS ORDER CIVIL NO. 74-7

F.E. HODGES, DIRECTOR DEFENDANT
DIVISION OF DRIVER LICENSING

* * * * * * *

In conformity with the mandate of the United States Court of Appeals for the Sixth Circuit issued on February 10, 1975, herein, and in conformity with the memorandum this day filed herein;

IT IS NOW THEREFORE ORDERED herein as follows:

(1) That the complaint herein be and the same is hereby dismissed.

(2) That this action be and the

same is hereby dismissed and stricken from the docket of this Court.

This the 14th day of February, 1975.

BERNARD T. MOYNAHAN, JR., JUDGE

ORDER OF THE COURT OF APPEALS
Filed January 17, 1975

NO. 74-1726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SYLVIA SCOTT WHITLOW,

Plaintiff-Appellant

-vs- ORDER

F.E. HODGES, Director
Division of Driver Licensing,
Department of Public Safety of
The Commonwealth of Kentucky,

Defendant-Appellee

BEFORE: MC CREE, LIVELY, and ENGEL
Circuit Judges.

This is an appeal from an order dismissing a complaint under 42 U.S.C. § 1983, alleging, inter alia, that an instruction given by the Director, Division of Driver Licensing, Department of Public Safety of the Common-

wealth of Kentucky, that requires a married woman to apply for a driver's license in her husband's surname contravenes Kentucky law and violates the equal protection clause of the Fourteenth Amendment. In her complaint, appellant sought to enjoin the Director for refusing to issue a driver's license to her in her maiden name.

Without deciding the merits of the claimed infringement of constitutional rights, and observing that appellant asserts that the law of Kentucky permits a married woman to retain her maiden name as her legal name, unlike the law of Alabama construed in Forbush v.

Wallace, 341 F. Supp. 247 (M.D. Ala. 1971) aff'd summarily, 405 U.S. 970 (1972), we vacate the order of the district court and remand the case to permit a preliminary inquiry into whether Kentucky law allows a married woman to retain her maiden name as her legal name, whether a woman applying for a motor vehicle license must do so in her legal name, and whether the instruction of the Director complies with these laws for the purpose of determining whether a three-judge court, 28 U.S.C. §2281, should be convened. If the district court should determine that Kentucky law, like Alabama law, requires a woman to take her husband's surname upon marriage, then a three-judge court is not required. Bailey v. Patterson,

369 U.S. 31 (1962). If the district court should conclude that Kentucky permits a woman to retain her maiden name as her legal name and that Kentucky law requires an applicant to obtain a driver's license in his legal name, then it would again appear that a three-judge court is not required. If, on the other hand, the district court should conclude that Kentucky does not require a woman to adopt her husband's surname and that Kentucky does not require an applicant to obtain a driver's license in his legal name, then the district court should determine whether the instruction of the Director is "...an order made by an administrative board or commission acting under State statutes...." 28 U. S.C. §2281. In appropriate circumstances

the district court should also determine the propriety of maintaining this action as a class action.

Accordingly, the judgment is vacated and the cause is remanded for proceedings consistent with this order.

Entered by order of the court

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Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

No. 74-7, Civil Docket

PLAINTIFF

SYLVIA SCOTT WHITLOW

V.

F.E. HODGES, ETC. DEFENDANT

ORDER

The motion of the defendant to dismiss the complaint is sustained and the complaint is dismissed at the cost of the plaintiff. Forbush v. Wallace, 341 F. Supp. 217 (1971), affirmed 405 U.S. 970 (March 6, 1972).

MAC SWINFORD

Mac Swinford, Judge

May 6, 1974